UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH E. SIMANONOK,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-357-P-C***
	)	
EMILE LAMONTAGNE, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON CERTAIN DEFENDANTS' MOTIONS TO DISMISS

Emile and Doris Lamontagne, two of forty-one defendants[1] named in the complaint in this action by the *pro se* plaintiff, move for dismissal of all claims against them. Defendants Kevin Concannon, Will Cook, Dora Anne Mills, Edward Sullivan and Paul VanCott move for dismissal of Counts IV and V. Count IV is asserted against defendants Sullivan, VanCott and Cook, all employees of the Maine Department of Environmental Protection ("DEP"). Count V is asserted against defendants Concannon and Mills, employees of the Maine Department of Human Services ("DHS"). However, both counts appear to demand relief against all defendants. I recommend that the court grant the motions.

I. Standards for Review of Motions to Dismiss

[1] This action has been dismissed as against defendants Carol Lamontagne (Docket No. 6), Town of Waterboro, Venduro Foglio, Lawrence Morrill and Kerry Perkins (Docket No. 28).

The motions to dismiss are based on Fed. R. Civ. P. 12(b)(1) and (6).[2] When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc*., 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dep't of Educ*., 9 F.3d 184, 187 (1st Cir. 1993). Although all inferences must be indulged in the plaintiff's favor, the court need not accept "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments, and claims that are not included in the

[2] The Lamontagne defendants also rely on Rules 8(a) and 41(b), but it is not necessary for the court to consider those rules in order to rule on their motion.

complaint. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

II. Factual Background

The complaint contains the following assertions. The plaintiff resides on property located in Waterboro, Maine. Complaint (Docket No. 1) ¶ 4. The Lamontagne defendants reside on property abutting the plaintiff's property. *Id.* ¶ 16. These properties are shoreland lots on Little Ossippee Lake. *Id.* ¶ 17. Beginning in October 1988 the Lamontagne defendants undertook certain actions on their lot, including the installation of a new subsurface waste disposal system, expanding a house foundation and adding two stories to the building, razing an existing seasonal cottage, and constructing a concrete retaining wall, all without the required permit from the DEP. *Id.* ¶ 18. The waste disposal system was installed next to the plaintiff's property. *Id.* ¶ 19. The plaintiff learned of its existence in August 1996. *Id.* ¶ 24.

Spring run-off carries phosphate fertilizer used by the Lamontagne defendants as well as other material from their lot into the lake. *Id.* ¶ 20. The structure on the Lamontagne lot does not comply with setback provisions of state law and the zoning ordinance of the Town of Waterboro. *Id.* ¶ 21. In July 1994 the plaintiff complained to the DEP about pollution of the lake by the Lamontagnes, but no action was taken. *Id.* ¶ 23. The plaintiff complained to the DEP in August 1996 about the Lamontagne defendants' subsurface waste water disposal system, which the plaintiff characterized as illegal; defendant Cook visited the site and stated that the structures were placed there according to law and that nothing could be done about the fertilizer run-off. *Id.* ¶ 24. The plaintiff supplied DHS with a copy of his complaint on November 13, 1996; DHS has not investigated his complaint. *Id.* ¶ 31.

The complaint asserts that defendant Cook has violated the plaintiff's rights to due process and equal protection under the Constitution by his inaction, and that he has "aided and abetted" the invasion of the plaintiff's privacy by the Lamontagnes. *Id.* ¶ 25. Because defendants Concannon and Mills are responsible for administration of state plumbing and subsurface waste disposal laws and regulations, the complaint asserts, their inaction has deprived the plaintiff of his due process and equal protection rights; they are also alleged to have engaged in the aiding and abetting activity charged against Cook. *Id.* ¶ 27. Defendants Sullivan and VanCott are alleged to have committed similar wrongs by their "tortious disregard of state laws duly enacted for the protection of the health, safety, and welfare of Plaintiff." *Id.* ¶ 28.

Count I of the complaint alleges that the Lamontagnes have denied the plaintiff the equal protection and due process of state and local law. Count II alleges that the Lamontagnes have invaded the plaintiff's privacy. Count III appears to be asserted against defendants not parties to the motions to dismiss. Count IV raises the constitutional claims against defendants Sullivan, Cook and VanCott. Count V asserts the constitutional claims against defendants Concannon and Mills.

Asserting jurisdiction under 42 U.S.C. § 1983, the complaint seeks relief in the nature of mandamus against the DEP, *id.* ¶ 45, a preliminary injunction against all of the defendants, *id.* ¶ 46, "nominal" damages in the amount of $25,000 from each defendant, *id.* ¶ 47, punitive damages in the amount of $75,000 from each defendant, *id.* ¶ 48, declaratory judgment, *id.* ¶¶ 49-50, and unspecified fines and penalties, *id.* ¶ 51.

III. Analysis

A. The State Defendants' Motion

The state defendants argue that the plaintiff lacks standing because he does not allege that he is being prosecuted or threatened with prosecution; that they enjoy absolute immunity from the claims raised by the plaintiff; that the plaintiff's claims against them in their official capacities for monetary damages are barred; that the equitable relief sought by the plaintiff is unavailable; that the plaintiff has no constitutional right to be protected by the state from harm at the hands of third parties; and that the complaint fails to allege the essential elements of an equal protection claim. The last two arguments are dispositive.

Counts IV and V allege that the state defendants deprived the plaintiff of equal protection and due process by failing to prevent the violation of state and local health and safety laws and the invasion of his privacy by the Lamontagnes and the remaining defendants. Complaint ¶¶ 42, 44. The due process claim, as explicated in the plaintiff's Response to Motion of State Defendants (Docket No. 13), appears to be that the state defendants had a duty to "comply with their own statutory procedures" for the benefit of the plaintiff, which they failed to do. *Id.* at 2.

> But nothing in the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . .
>
> Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it

chosen to provide them.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-97 (1989). The plaintiff has not alleged that he is wholly dependent on the state, a relationship that might impose on the state a duty to provide certain services. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). To the extent that the plaintiff's due process claim is based on a failure to investigate his complaint, there is no constitutional duty to conduct such an investigation. *Slagel v. Shell Oil Refinery*, 811 F. Supp. 378, 382 (C.D. Ill. 1993). None of the state statutes cited by the plaintiff imposes a duty to investigate complaints, nor do they bestow upon owners of property abutting property subject to those statutes any right to compel action by the state. For all of these reasons, the state defendants are entitled to dismissal of the due process claims.

The complaint also fails to allege a violation of the constitutional guarantee of equal protection. It does not allege that the plaintiff was treated differently from others similarly situated by the state defendants, nor that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure him, both of which are necessary elements of an equal protection claim. *See Yerardi's Moody St. Restaurant & Lounge, Inc. v. Board of Selectmen*, 932 F.2d 89, 92 (1st Cir. 1991). "Absent any allegation of a discriminatory purpose, a mere failure of those who administer the law to treat equally all persons who violate the law does not constitute a denial of the constitutional right to equal protection." *Harrington v. United States*, 673 F.2d 7, 11 (1st Cir. 1982). "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). In the absence of allegations that selective enforcement was based on an arbitrary classification, grounds to support a finding of a denial of

equal protection have not been alleged. *Id.* The state defendants are entitled to dismissal of the equal protection claims.

Finally, the complaint also fails to allege any actionable invasion of the plaintiff's constitutional privacy right. The constitutionally protected right to privacy involves three different kinds of interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The other is the right of the individual to be free in his private affairs from governmental surveillance and intrusion, which is directly protected by the Fourth Amendment. *Id*. at 599 n.24. None of the conclusory allegations in the complaint concerning an asserted violation of a right to privacy suggests that the Lamontagne defendants, whom the state defendants are alleged to have aided and abetted, engaged in conduct affecting any of the three interests. Therefore, dismissal is appropriate as to any privacy claims as well.

B. The Lamontagnes' Motion

The complaint asserts claims against the Lamontagnes only under section 1983.[3] In order to state a claim under section 1983, a plaintiff must plead that he was deprived of a right, privilege or immunity protected by the Constitution and that the defendant deprived him of that right while acting under the color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). The Lamontagnes argue that the complaint fails to allege that they were acting under color of state law or that their

[3] It is possible that the complaint may be construed to assert claims under 42 U.S.C. § 1985 as well. The Lamontagne defendants seek dismissal of any section 1985 claims in their motion. The plaintiff has failed to respond to that portion of the motion to dismiss and has therefore waived objection. Local Rule 7(b). To the extent that the complaint asserts claims against the Lamontagne defendants under section 1985, dismissal is appropriate.

actions amounted to state action. The plaintiff responds that the Lamontagnes acted under color of state law because defendant Emile Lamontagne applied for a permit to expand the building on his lot.[4]

The mere act of applying for a local building permit[5] does not and cannot make an individual a state actor for purposes of everything he does or does not do in connection with that permit. In determining whether a private defendant's conduct constitutes state action, "[w]hile state involvement does not have to be direct, the 'conduct allegedly causing the deprivation of a federal right must be fairly attributable to the state.'" *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 95 (1st Cir. 1990) (citation omitted). Here, the complaint does not allege direct state action by the Lamontagnes. In order to establish indirect state action, the complaint must allege some nexus with the state so that the actions of the defendants can be found to have occurred on the strength of state authority. *Id.* at 96. "The test is . . . whether the government exercised coercive power or provided such significant encouragement that the choice [to act as the defendants are alleged to have acted] must be deemed to be that of the government." *Id*. at 97. Here, the complaint alleges the opposite; that the defendants acted in opposition to state authority and/or requirements. The complaint does not allege state action by the defendants, and dismissal is therefore appropriate.

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[4] The plaintiff's assertion that the Lamontagnes also acted under color of state law because defendants Stanley and Cook stood on their property and acknowledged the existence of run-off pollution at the site, Plaintiffs' [sic] Response to Lamontagnes' Motion For Dismissal of Complaint (Docket No. 14) at 2, is without merit. That factual assertion in no way implicates the Lamontagnes as taking any action at all, let alone state action. Nor does any allegation in the complaint support the plaintiff's assertion that Stanley and Cook were the Lamontagnes' "supervisors."

[5] The complaint does not contain any allegation concerning the application for a permit. However, the application itself is attached to the complaint. This defect in the complaint could easily be corrected by amendment. However, such an amendment would not cure the more serious flaw in the complaint, the lack of any state action by the Lamontagnes.

C. State Law Claims

It is not entirely clear on the face of the complaint whether the plaintiff intends to assert state-law claims against the moving defendants in addition to his section 1983 claims. To the extent that the complaint may be read to assert such claims, I recommend that the court decline to exercise jurisdiction over them. 28 U.S.C. § 1367(c).

IV. Conclusion

For the foregoing reasons, I recommend that the motion to dismiss of defendants Concannon, Cook, Mills, Sullivan and VanCott be **GRANTED** and that the motion to dismiss of defendants Emile and Doris Lamontagne be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 11th day of June, 1997.

David M. Cohen
United States Magistrate Judge